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Pimping and Pornography as Sexual Harassment: Amicus Brief in Support of Plaintiff-Respondent in *Thoreson v. Penthouse Int'l LTD.*

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PIMPING AND PORNOGRAPHY AS SEXUAL HARASSMENT: AMICUS BRIEF IN SUPPORT OF PLAINTIFF-RESPONDENT IN *THORESON v. PENTHOUSE INT'L LTD.*†

*Dorchen A. Leidholdt**

INTRODUCTION

In March 1989, the New York City tabloids announced a forthcoming trial, with headlines like "Pet Peeve" and "Petulant Pet's Cry." The case was *Thoreson v. Penthouse International Ltd.*[1] The media's characterization of Plaintiff Marjorie Lee Thoreson, AKA Anneka DiLorenzo, a former "*Penthouse* Pet," as a "girlie mag featurette" demonstrated that they clearly viewed the lawsuit as a form of sexual entertainment. Women Against Pornography, the New York City feminist organization I helped found, had a different perspective. On behalf of this group, I contacted the Plaintiff's lawyer, Murray Schwartz, and he took us up on our offer of help. This help included lending moral support to DiLorenzo throughout the trial and, subsequently, writing amicus briefs at two stages of appeal on behalf of the Women's Bar Association of the State of New York, The National Coalition Against Sexual Assault, and other feminist organizations.

The trial, at which both DiLorenzo and Robert Guccione, the Defendant, testified, provided a rare opportunity to study the modus

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† Several issues were raised on appeal to the New York Court of Appeals. Thoreson AKA DiLorenzo was the Respondent on the issue of sexual harassment and the Appellant on the issue of the amount of damages awarded by the Supreme Court. This portion of the brief addresses only the issue of sexual harassment. Wendy C. Lecker (J.D. 1988, New York University School of Law), authored a section on the issue of compensatory damages.

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1. 563 N.Y.S.2d 968 (Sup. Ct. N.Y. County 1990), *aff'd*, 583 N.Y.S.2d 213 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

operandi of a sex industry kingpin. It also demonstrated how litigation can further the speech of those who have long been silenced. DiLorenzo, whose testimony the judge found to be thoroughly credible, testified that she first encountered Guccione in 1973 after he appeared on the Merv Griffin show, claiming to be a filmmaker in search of new talent. Guccione was just beginning to launch the American edition of *Penthouse*, until this time well-known only in Great Britain; DiLorenzo was a twenty-year-old who dreamed of becoming an actress but who had supported herself primarily by working as a cocktail waitress. Guccione encouraged her to pose for *Penthouse*, personally taking the photographs during a three-day session in the bedroom of his London apartment. Afterwards he persuaded her to sign a management contract that authorized him "to advise, counsel and guide the artist in the proper development of the artist's talent and the selection and preparation of suitable entertainment material."[2] Although Guccione repeatedly claimed to DiLorenzo throughout the next few years that he was meeting with people about her acting career, the jobs he sent her out on required little acting ability. Clad in a French maid's outfit draped with a sash that read "*Penthouse* Pet," DiLorenzo traveled the country on publicity tours promoting *Penthouse*, making appearances at shopping centers and automobile shows.

In 1975, DiLorenzo was made "Pet of the Year" and placed on the *Penthouse* payroll at a salary of $200 a week. At Guccione's urging, she moved into his New York townhouse where he lived with his girlfriend, Kathy Keeton. Working six to seven days a week until the early morning hours (although compensated for only three days' work), DiLorenzo babysat his children, entertained his business associates, walked his dog, and sexually serviced him.

In the beginning of 1977, Guccione began to talk to DiLorenzo about *Caligula*,[3] the epic movie he was planning to produce. He promised her the important role of Caligula's wife, but told her that if she

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2. Record at 675–76, Thoreson v. Penthouse Int'l Ltd., No. 13039 (Sup. Ct. N.Y. County, Oct. 23, 1990) (all cites to the record herein are those originally cited in the brief filed with the New York Court of Appeals).

3. Intended to be Guccione's opus, *Caligula* was filmed in 1977. Although *Caligula* was ostensibly about the life of the brutal and sadistic Roman emperor, one writer labeled it as "a series of mechanical sexual performances of the Times Square variety," and critics panned it. By the time the film was released in the late 1970s, script writer Gore Vidal, director Tinto Brass, and actor Roddy McDowell had disassociated themselves from Guccione's production. Gwenda Blair, *Citizen Guccione*, ATTENZIONE, June 1981, at 53.

wanted the part she would have to have her breasts enlarged. DiLorenzo agreed to have the operation. Beforehand, Guccione met with the plastic surgeon and described to him exactly how he wanted DiLorenzo's breasts to look. After the operation, DiLorenzo was presented with the bill for the surgery.

While recuperating, DiLorenzo learned that another actress had been cast as Caligula's wife. Guccione promised her that she would have another part, one just as good. This part turned out to be the role of a slave girl, with no speaking lines.

While feuding with *Caligula*'s director, Tinto Brass, over his failure to cast "pretty girls" in the film, Guccione approached DiLorenzo and told her that it was incumbent upon her to rescue *Caligula* by appearing in some additional scenes that he would secretly edit into the film. He did not tell her what kind of scenes he had in mind, but he assured her that he would "personally direct" them and that they would be "beautiful."[4] Before he slipped her into the studio late one night to film the scenes, Guccione informed DiLorenzo that these scenes would require her to perform oral sex on a male actor and simulate lesbian sex. To her protests that she wanted to be an actress, not "a porno actress,"[5] Guccione replied that by doing the scenes she would save the film, share in its financial success, and forever "be part of the *Penthouse* family."[6] DiLorenzo reluctantly complied with his wishes.

In 1978, Guccione tried unsuccessfully to raise capital to build a big casino in Atlantic City, New Jersey. His anxiety over this project was intensified by his strong and, as it turned out, prophetic intimations that *Caligula* was going to bomb. On top of that, his senior financial advisor, Gerald Kreditor, was balking at the idea of moving from London to New York City to assume responsibility for Guccione's troubled finances. Guccione tried to lure Kreditor with offers of gifts and money, but Kreditor rejected them.

Again Guccione turned to DiLorenzo to rescue him, and again the rescue scheme involved using her as sexual bait. Guccione planned to entice Kreditor to move to New York by having DiLorenzo initiate a sexual relationship with him. When he proposed this idea to DiLorenzo, she was shocked and emphatically told him that she did not want to have sex with Kreditor. Guccione responded with the identical

4. Record at 768.
5. Record at 774–75.
6. Record at 773.

arguments he had used to persuade her to perform in *Caligula*'s explicit sex scenes. Once again, she reluctantly complied.

For the next eighteen months, Guccione scripted and directed DiLorenzo in an "affair" with Kreditor, telling her what to do and when to do it. Finally, DiLorenzo could no longer endure the situation and terminated the relationship with Kreditor. Guccione responded by sending DiLorenzo around the country to promote *Caligula*, introducing her as a "woman for pornography."[7] Humiliated by the press' reaction to her performance,[8] DiLorenzo began to understand that the explicit pornographic scenes in *Caligula* had sabotaged any hope of an acting career.

After this promotional trip, Guccione, unsuccessful in raising funds for the casino project, went to DiLorenzo and ordered her to have sex with a furniture company owner whom he hoped would back the project. DiLorenzo cried and protested that she had never even met the man. Guccione stood over her, waved his finger in her face, and told her that she "owed him."[9] Once again, she submitted.

Guccione then told DiLorenzo that he wanted her to promote *Caligula* while touring with him in Japan. DiLorenzo was terrified by this request because she "didn't know who he would ask her to sleep with next."[10] It is likely that Guccione was well aware that, in a country with one of the largest sex industries in the world,[11] DiLorenzo would be a valuable commodity. DiLorenzo told him she did not want to travel to Japan to promote *Caligula*. Guccione replied that she had to. She responded, "I'm going to have a nervous breakdown. I can't go on that tour."[12] His answer was to fire her.

Although DiLorenzo's complaint alleged a variety of causes of action, from breach of contract and fraud to intentional infliction of emotional harm, the trial court found for the Plaintiff exclusively on the sexual harassment claim.[13] It awarded her $60,000 in compensatory

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7. Record at 1487.
8. Record at 857, 1464.
9. Record at 864.
10. Record at 866.
11. Yayori Matsui, *Trafficking in Women and Prostitution in Japan*, WOMEN EMPOWERING WOMEN (Coalition Against Trafficking in Women-Asia, Manila, Phil.), 1993, at 6 (on file with the *Michigan Journal of Gender & Law*).
12. Record at 867.
13. Thoreson v. Penthouse Int'l Ltd., 563 N.Y.S.2d 968, 972 (Sup. Ct. N.Y. County 1990) ("Plaintiff's testimony . . . was controverted only by defendant Guccione's blanket denial that the events took place. I do not believe him."), *aff'd as modified*,

damages and $4,000,000 in punitive damages. Rejecting Guccione's testimony at trial as incredible, the court held that his acts of pimping DiLorenzo to his business associates constituted illegal quid pro quo sexual harassment:

> Defendants used the plaintiff in furtherance of their business as if she were property owned by them. Although the plaintiff's employment enabled the defendants indirectly to profit from her physical appearance and acting abilities, it did not render her a commodity to be leased, sold, traded or exploited because of her womanhood. Defendants' conduct is punishable as more than simply a violation of plaintiff's job-related property rights. It represents a flagrant abuse of power, violating plaintiff's civil rights and denigrating women as a class.[14]

Guccione and *Penthouse* appealed both the damages awards and the trial court's finding of sexual harassment.[15] The Appellate Division struck down the punitive damages award on the grounds that New York State Human Rights Law did not specifically provide for them.[16] The Court of Appeals affirmed the Appellate Division's ruling.[17] However, both appellate courts upheld the sexual harassment finding and the compensatory damages award because they were unpersuaded by Cross-Appellants' argument that, even if Guccione had pimped DiLorenzo, she had waived any right to protest such exploitation by working for a publication like *Penthouse*.

In the final analysis, the trial court's decision is a real, even if partial victory for feminism. By crediting the testimony of a woman exploited by the sex industry and holding her exploiter accountable under sexual harassment law for subjecting her to forms of pimping, the court empowered a class of women whose considerable injuries have been all but ignored by our legal system. However, by exempting Guccione's pimping of DiLorenzo in the two *Caligula* scenes from its

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583 N.Y.S.2d 213 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

14. *Thoreson*, 563 N.Y.S.2d at 977.

15. Throughout this brief, the term "Defendant" will be used to refer to Robert Guccione and the term "Cross-Appellants" will be used to refer to both Robert Guccione and Penthouse International Ltd.

16. Thoreson v. Penthouse Int'l Ltd., 583 N.Y.S.2d 213, 215–17 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

17. Thoreson v. Penthouse Int'l. Ltd., 606 N.E.2d 1369, 1371–73 (N.Y. 1992).

finding of sexual harassment, the court implicitly balanced the free speech rights of the pornographer against the right of his employee to be free from sexual harassment and came down on the side of the pornographer. What the trial court failed to comprehend is that when the employer is in the business of manufacturing so-called speech, the employee who embodies that "speech" more than ever requires protection from sexual harassment.

ARGUMENT

I. THE APPELLATE DIVISION CORRECTLY SUSTAINED THE TRIAL COURT'S FINDING OF QUID PRO QUO SEXUAL HARASSMENT.

Quid pro quo sexual harassment is "harassment in which a supervisor demands sexual consideration in exchange for job benefits."[18] To establish an employer's liability under the quid pro quo theory, an employee must show that "as a result of her response to the harassing conduct, she 'was deprived of a job benefit . . .' or in some other way sustained a 'tangible job detriment.'"[19] The sexually harassing employer explicitly or implicitly conditions employment consequences on the employee's submission to sexual conduct.[20] The bottom line of a quid pro quo claim is that "[t]he employee's reaction" to her employer's request for sexual favors results in her loss of either a job benefit or the job itself.[21]

At trial, Plaintiff testified that Defendant demanded she initiate and carry on a sexual relationship with his chief financial advisor, Gerald Kreditor, in order to entice Kreditor to move to New York, after promises of a new house and financial rewards had failed to lure

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18. Rudow v. New York City Comm'n on Human Rights, 474 N.Y.S.2d 1005, 1010 (Sup. Ct. 1984), *aff'd*, 487 N.Y.S.2d 453 (App. Div. 1985), *appeal denied*, 489 N.E.2d 1302 (N.Y. 1985); *accord* Tomkins v. Pub. Serv. Elec. & Gas Co., 568 F.2d 1044, 1048–49 (3d Cir. 1977); Barnes v. Costle, 561 F.2d 983, 989–90 (D.C. Cir. 1977); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32–47 (1979).

19. Watts v. New York City Police Dep't, 724 F. Supp. 99, 103 (S.D.N.Y. 1989) (quoting Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)).

20. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1414 (10th Cir. 1987); Koster v. Chase Manhattan Bank, 687 F. Supp. 848, 861 (S.D.N.Y. 1988).

21. *Koster*, 687 F. Supp. at 861 (quoting Jones v. Flagship Int'l, 793 F.2d 714, 721–22 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987)); *accord* Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 783 (1st Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881, 898 (1st Cir. 1988).

him there. Defendant then orchestrated the "affair" for a period of eighteen months.[22] After the relationship ended, Defendant insisted that Plaintiff have sex with the owner of an Italian furniture manufacturing company who Defendant hoped would provide financial backing for his faltering New Jersey casino project.[23] When Defendant demanded that Plaintiff accompany him to Japan, she refused. Plaintiff knew he would continue his demands, in an environment in which Plaintiff's resistance would be impossible, because he was hoping to secure desperately needed financial support. Plaintiff testified that she was afraid to go on the tour because "I didn't know who he would ask me to sleep with next."[24] Through her testimony, Plaintiff established an escalating pattern of sexual harassment in which Defendant required her to provide sexual favors to his business associates for his own financial objectives. "[A]s a result of [Plaintiff's] response to the harassing conduct"[25] (i.e., she refused to go to Japan, where she knew Defendant would demand continued sexual submission) "she 'was deprived of a job benefit . . . .'"[26] The Defendant fired her.

Not only did Plaintiff receive the ultimate economic detriment when she successfully resisted Defendant's harassment—a fact that clearly shows that compliance with Defendant's sexual demands was an implicit condition of her employment—but Defendant extracted sexual favors from her by explicitly promising her job benefits. Defendant specifically told Plaintiff that he needed her help and that her cooperation would make her "part of the *Penthouse* family," a phrase that Defendant had used previously to persuade her to perform two sexually explicit scenes in *Caligula*.[27] Plaintiff understood exactly what Defendant meant when he promised that she would be "part of the *Penthouse* family": Defendant would give her financial security for the rest of her life. ("I would never have to worry about anything.")[28]

In addition to explicitly promising Plaintiff permanent financial security if she would submit to his sexual demands, Defendant implicitly threatened her with job loss if she refused to carry out his orders.

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22. Record at 825–28.
23. Record at 864.
24. Record at 866.
25. *Watts*, 724 F. Supp. at 103.
26. *Watts*, 724 F. Supp. at 103 (quoting Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)).
27. Record at 773.
28. Record at 785.

When Defendant met with Plaintiff, in order to secure her cooperation in his scheme to lure Kreditor to the United States, he let her know in no uncertain terms that her performance of this favor was very important to him and "meant a lot to his empire."[29] For Plaintiff to refuse to carry out something essential to the *Penthouse* "empire" would surely have grave repercussions for her employment by Defendant. The threat of job loss was made even more explicit when Plaintiff initially refused Defendant's demand that she have sex with the owner of the furniture company: Defendant stood over her, pointed his finger at her, and told her that she "had to do it."[30] To hammer home his point, Defendant then told Plaintiff that she "owed him."[31] Thus, Defendant told Plaintiff in no uncertain terms that she was indebted to him for her employment and had to pay off that debt by complying with his order to have sex with a potential financial backer of his casino project. Cross-Appellants' contention that "Plaintiff presented absolutely no evidence that her acquiescence was made a condition of her employment" is squarely contradicted by the record.[32]

The fact that Defendant did not carry out his threat until Plaintiff refused to accompany him to Japan is not surprising. Although Defendant was angry with Plaintiff when she terminated the affair with Kreditor, it was abundantly clear, after eighteen months, that he could no more succeed in luring Kreditor to relocate to New York by a sexual relationship with Plaintiff than by the offers of a big, new house and more money. Moreover, within weeks Plaintiff submitted, albeit under protest, to his demand that she have sex with another associate from whom he wanted favors.[33] Defendant was in dire financial straits with his Atlantic City casino project and believed that, with Plaintiff as sexual bait, he could secure the financial backing he urgently needed.[34] No doubt hoping to ensure Plaintiff's compliance with his demands in Japan, where the financial stakes were high and Plaintiff would be an especially desirable commodity,[35] Defendant gave her a small raise. It

29. Record at 826.
30. Record at 864.
31. Record at 846.
32. Record at 1240–43.
33. Record at 864, 1246.
34. Record at 862–63, 1241–43.
35. Plaintiff is blond and blue-eyed. In Japan's sex industry, racial characteristics, especially blond hair and blue eyes, are highly sexualized. One cannot help being struck by the frequent depictions of Western women in Japanese pornography. The use of

was not until Plaintiff refused to go with Defendant to Japan that he realized she would no longer provide the sexual services so useful to his "empire," and he exacted the ultimate employment consequence.

In this case, there was no significant hiatus between Defendant's sexual harassment of Plaintiff, her resistance to that harassment, and her termination by Defendant. Plaintiff ended the sexual relationship with Kreditor in May 1980; in the summer of that year, Defendant demanded that she sleep with the furniture company owner; and in September of that year, he fired her. Even if there were such a hiatus, however, courts have held that a time lag between an employee's resistance to sexual harassment and the employer's termination of her employment does not undermine the employee's quid pro quo claim. In *Chamberlin v. 101 Realty, Inc.*,[36] the First Circuit found that a two-and-one-half month hiatus between an employer's request for sexual favors (immediately followed by the employee's rejection of that proposition) and the termination of the employee's job did not destroy the employee's quid pro quo claim.[37] In *Tomkins v. Pub. Service Electric & Gas Co.*,[38] the Third Circuit ruled that a "firing" more than one year after the employer's advance was no bar to a quid pro quo claim.[39] Likewise, in *Barbetta v. Chemlawn Services Corp.*,[40] a New York district court held, in a constructive discharge case, that "[t]he passage of time alone [between the last alleged incident of sexual harassment and Plaintiff's termination of her employment] is not dispositive."[41]

In *Chamberlin*, the First Circuit found direct evidence of quid pro quo sexual harassment in five instances of the employer's sexually motivated conduct, none of which were accompanied by employment-related promises or threats.[42] The court held that quid pro quo sexual harassment could be inferred from the pattern of employer's

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Western women in Japan parallels the use of non-Caucasian women in Western pornography—to create a greater sense of "otherness" so as to absolve the (majority) male voyeur of any feeling of responsibility toward the (minority) women portrayed. *See* Lesley A. Rimmel, Pornography and Feminism in Japan: Notes from a *Gaijin* 8–9 (Summer 1988) (unpublished manuscript, on file with the *Michigan Journal of Gender & Law*).

36. 915 F.2d 777 (1st Cir. 1990).
37. *Id.* at 777, 785 n.10.
38. 568 F.2d 1044 (3d Cir. 1977).
39. *Id.* at 1047.
40. 699 F. Supp. 569 (W.D.N.Y. 1989).
41. *Id.* at 572.
42. *Chamberlin*, 915 F.2d at 785.

sexual advances, employee's lack of response, and employee's termination. In comparison, the facts of the case at bar, replete with explicit threats and promises by the employer, constitute far clearer evidence of a job-related quid pro quo.

In *Lipsett v. University of Puerto Rico*,[43] the First Circuit found direct evidence of quid pro quo sexual harassment in the suggestion by the chief resident of a medical school that a first-year female resident . . . keep a relationship with a high-level resident "in order to ease her way through [the program]."[44] (Plaintiff rejected his advice and was ultimately terminated from the program during her second-year of residency.) These facts directly echo, if somewhat faintly, those of the instant case in which Plaintiff was ordered by Defendant to have sex with others, cajoled and threatened into doing so, and abruptly fired when she resisted his sexual demands.

II. THE RECORD SUPPORTS THE FINDING THAT DEFENDANT SUBJECTED PLAINTIFF TO A SEXUALLY HOSTILE WORK ENVIRONMENT.

In addition to quid pro quo sexual harassment, the trial court's determination is equally well supported by a hostile environment theory. Hostile environment sexual harassment has been recognized as a violation of New York Human Rights Law since the holding of Judge Glen in *Rudow v. Comm'n on Human Rights*:[45]

> [W]henever an employer or supervisor requires workers to endure unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, such as looks, touches, jokes, gestures, innuendos, epithets or propositions, and such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment, that person is committing sexual harassment in violation of the Administrative Code.[46]

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43. 864 F.2d 881 (1st Cir. 1988).

44. *Id.* at 905–06.

45. 44 N.Y.S.2d 1005 (Sup. Ct. N.Y. County 1984), *aff'd* 487 N.Y.S.2d 453 (App. Div. 1985), *appeal denied*, 489 N.E.2d 1302 (N.Y. 1985).

46. *Id.* at 1013.

This definition of a sexually hostile work environment has been employed by federal courts in Title VII cases in each circuit and was endorsed by the Supreme Court in *Meritor Savings Bank FSB v. Vinson.*[47] "This kind of sexual harassment . . . 'implicitly and effectively make[s] the employee's endurance of sexual intimidation a 'condition' of her employment.' "[48]

A. Defendant's Repeated Remands that Plaintiff Engage in Sexual Relationships for Defendant's Monetary Gain Constituted Pervasive and Severe Sexual Harassment.

The Supreme Court held in *Meritor Savings Bank FSB v. Vinson*[49] that "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' "[50] Whether an employer's conduct reaches that degree of severity or pervasiveness must be determined "in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.' "[51] To reach a determination of hostile work environment, "the finder of fact [is legally required to] examine not only the frequency of the incidents, but the gravity as well."[52] In *Vance v. Southern Bell Telephone & Telegraph Co.*,[53] the Eleventh Circuit held that two instances of a defendant hanging a noose over a plaintiff's workplace were sufficient to support her charge of a racially hostile environment.[54] Hence, although generally, repeated

47. 477 U.S. 57, 66–68 (1986). *See, e.g.*, Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

48. *Rudow*, 474 N.Y.S.2d at 1011, *aff'd*, 487 N.Y.S.2d 453 (App. Div. 1985), *appeal denied*, 489 N.E.2d 1302 (N.Y. 1985) (quoting Bundy v. Jackson, 641 F.2d 934, 946 (D.C. Cir. 1981)).

49. 477 U.S. 57 (1986).

50. *Id.* at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

51. *Meritor*, 477 U.S. at 69.

52. Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1511 (11th Cir. 1989).

53. 863 F.2d 1503 (11th Cir. 1989).

54. *Id.* at 1511. *See also* Comment, *Employment Discrimination—Sexual Harassment and Title VII—Female Employees' Claim Alleging Verbal and Physical Advances by a Male Supervisor Dismissed as Non-Actionable*—Corne v. Bausch & Lomb, Inc., 51 N.Y.U. L. REV. 148, 164 n.76 (1976) ("Where sexual attentions take an extreme or

incidents create a stronger claim of hostile environment,[55] "conduct less pervasive, but more offensive in form and effect, than slurs and epithets can so poison a working environment as to render it abusive."[56]

There is no question that Defendant's harassment of Plaintiff was "continuous and concerted."[57] Defendant intimidated Plaintiff into dispensing sexual favors to his financial advisor throughout an eighteen-month period. The campaign to entice Kreditor, in and of itself, is more than sufficient to establish pervasiveness. Courts have found pervasiveness sufficient to support a claim for hostile environment sexual harassment in cases where the employer's actions were considerably less prolonged than those of Defendant. In *Bennett v. New York City Department of Corrections*,[58] there were nine separate incidents, ranging from sexually explicit graffiti to a slap on the buttocks;[59] in *Danna v. New York Telephone Co.*,[60] sexually explicit graffiti and one sexually hostile comment;[61] in *Watts v. New York City Police Department*,[62] two instances of unwanted sexual touching;[63] in *Ellison v. Brady*,[64] three bizarre love letters;[65] in *Carrero v. New York City Housing Authority*,[66] fondling Plaintiff's knee and kissing her neck.[67]

Defendant's harassment of Plaintiff did not end with the Kreditor "affair." After its termination, Defendant demanded that Plaintiff provide sexual favors to another business associate, this one a complete stranger to her. Far from being "isolated" or "sporadic" incidents, Defendant's sexual harassment of Plaintiff was repeated and routine, a pattern and practice of abuse.[68]

"The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are

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coercive form . . . even one incident may be one too many.").

55. King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990).
56. Watts v. New York City Police Dep't, 724 F. Supp. 99, 105, (S.D.N.Y. 1989).
57. Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir. 1989).
58. 705 F. Supp. 979 (S.D.N.Y. 1989).
59. *Id.* at 986.
60. 752 F. Supp. 594 (S.D.N.Y. 1990).
61. *Id.* at 612.
62. 724 F. Supp. 99 (S.D.N.Y. 1989).
63. *Id.* at 105.
64. 924 F.2d 872 (9th Cir. 1991).
65. *Id.* at 873–74.
66. 890 F.2d 569 (2d Cir. 1989).
67. *Id.* at 578.
68. Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986).

pervasive."[69] In the instant case, the trial court's description of Defendant's conduct toward Plaintiff as "sexual extortion" is an apt characterization.[70] For eighteen months, Defendant abused his female employee by trading her to two of his business associates for their sexual gratification in exchange for his own anticipated financial gain. Defendant not only perpetuated and condoned the prostituting of Plaintiff, but he initiated, scripted, supervised, and controlled it by manipulating her as though she were his property and using her as sexual consideration in his business transactions. It is difficult to imagine a grosser violation of a woman worker's sexuality, integrity, autonomy, physical being, liberty, dignity, and equality.

Defendant's harassment of Plaintiff was without question "hostile and offensive enough to adversely affect . . . [the] well-being or work performance" of "a reasonable person facing the same circumstances."[71] Through his harassment of Plaintiff, Defendant turned the conditions of her workplace into precisely the kind of environment decried by Justice Goldberg in the landmark hostile racial environment case, *Rogers v. EEOC*[72]—one "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . ."[73]

When Defendant's sexual harassment of Plaintiff is evaluated from the perspective of a "reasonable woman," the standard increasingly adopted in sexually hostile work environment cases, the offensiveness of Defendant's conduct is even more extreme and outrageous.[74] For an employee, particularly a female employee, the experience of being

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69. *Carrero*, 890 F.2d at 578.

70. Thoreson v. Penthouse Int'l., Ltd., 563 N.Y.S.2d 968, 976 (Sup. Ct. N.Y. County 1990), *aff'd*, 583 N.Y.S.D. 213 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

71. *Watts*, 724 F. Supp. at 104. *Cf.* Bennett v. New York City Dep't of Corrections, 705 F. Supp. 979, 984 (S.D.N.Y. 1989) (employing "reasonable person" standard in hostile environment case).

72. 454 F.2d 234 (5th Cir. 1971), *cert. denied* 406 U.S. 957 (1972).

73. *Id.* at 238, *cert. denied* 406 U.S. 957 (1972).

74. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) ("[W]e believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990); *King*, 898 F.2d at 537; Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 572 (W.D.N.Y. 1989). *See also* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1458–59 (1984).

traded by an employer for sexual purposes is subjection to offensive behavior that far exceeds the requirement of being "sufficiently severe [so as] to alter the conditions of [her] employment and create an abusive working environment."[75] In *Keeping Women in Their Place*,[76] Professor Nadine Taub describes the impact on women workers of being forced by their employers into conditions of sexual servitude: "The situation in which a person is asked to exchange sexual services for continued employment is uniquely disturbing to women. It is a reminder, a badge or incident of a servile status, which women are striving to leave behind."[77]

Requiring a woman to trade her body, her sexual integrity, and her human dignity for economic survival is a profoundly humiliating, demeaning, and degrading act of abuse.[78] The reduction of women workers to sexual commodities perpetuates and reinforces the stereotyping of female employees that sexual harassment law both recognizes as an obstacle to women's equality in the workplace and is intended to eradicate.[79] Although too often employers sexually harass their female employees for their own sexual gratification, few carry their assault on a woman worker's dignity to the lengths that Defendant did in this case, callously pimping Plaintiff to his business associates in the hope of receiving economic benefits from the exchange.

In *Campbell v. Kansas State University*,[80] the court held that a supervisor's act of slapping a female employee on the buttocks coupled with a verbal threat to repeat the action was "sufficiently severe to constitute actionable sexual harassment."[81] The court reasoned: "[Defendant's] behavior robbed the plaintiff of her self-esteem at the

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75. *Meritor*, 477 U.S. at 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

76. Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev., 345 (1980).

77. Taub, *supra* note 76, at 368.

78. *See* Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981); MACKINNON, *supra* note 18, at 47 ("Like women who are raped, sexually harassed women feel humiliated, degraded, ashamed, embarrassed, and cheap, as well as angry."); U.S. MERIT SYSTEMS PROTECTION BOARD, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 41 (1988).

79. *Andrews*, 895 F.2d at 1483 ("Congress designed Title VII to prevent the perpetuation of stereotypes and a sense of degradation which serve to close or discourage employment opportunities for women." (citing Note, *supra* note 74, at 1455)).

80. 780 F. Supp. 755 (D. Kan. 1991).

81. *Id.* at 762.

workplace; she was demeaned, degraded and humiliated. . . . In this day of heightened sensitivity to sexual harassment and a woman's rights in the workplace, this court finds defendant's behavior wholly unacceptable . . . ."[82] If a slap on the buttocks demeans, degrades, and humiliates a woman worker, robbing her of her self-esteem, what does it do to her sense of self to be exploited by her employer as sexual bait in his financial wheeling and dealing?

B. The Totality of the Circumstances and the Record as a Whole Establish that Defendant Subjected Plaintiff to a Sexually Hostile Workplace.

In evaluating the hostility and abusiveness of a workplace, the trier of fact must analyze the alleged instances of sexual harassment "in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.' "[83] Indeed, "one of the critical inquiries in a hostile environment claim must be the *environment.* Evidence of a general work atmosphere . . . is an important factor in evaluating the claim."[84] Although the trial court limited its findings of sexual harassment to only Defendant's most egregious abuses of Plaintiff, the entire pattern of conduct toward her that emerged at trial must be taken into consideration in assessing the hostility of her workplace.

Throughout the course of their relationship as employer and employee, Defendant used Plaintiff as a sexual plaything, domestic servant, and sexual commodity for his economic gain, manipulating her to do his bidding by exploiting her lack of experience and her economic vulnerability. At the start of their employment relationship, Defendant staked his claim on Plaintiff by seducing her and pressuring her to sign a management contract that required her to be guided by his advice, but he had no intention of carrying out its terms.[85] When Defendant brought Plaintiff to New York, purportedly to promote her career as a model and actress, he moved her first into the dressing room adjoining his bedroom and then into a room in the basement without a

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82. *Campbell,* 780 F. Supp. at 762.

83. *Meritor,* 477 U.S. at 69 (citing 29 CFR § 1604.11(b) (1985)). *See also Vance,* 863 F.2d at 1510 ("[E]ach alleged incident of harassment [need not be] judged in a vacuum.").

84. Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987).

85. Record at 645–75.

telephone, where she was at his beck and call, working six- to seven-day weeks, walking his dog, babysitting his children, assisting him with his editorial duties, and sexually servicing him.[86]

Between brief stints posing for *Penthouse*, Plaintiff promoted *Penthouse* by appearing at record stores, shopping center openings, and automobile shows, wearing the obligatory costume, a French maid uniform with a sash that read "*Penthouse* Pet."[87] Plaintiff also promoted *Penthouse* on Defense Department sponsored tours, entertaining the troops with a sexually suggestive comedy routine written by a *Penthouse* writer and answering media questions with a script written by Defendant.[88] Promising Plaintiff an important role in *Caligula*, Defendant ordered her to surgically enlarge her breasts, instructing the surgeon before the operation precisely how he wanted Plaintiff's breasts to appear.[89] The important role in *Caligula* ended up being two extremely graphic sexual scenes that Defendant bullied Plaintiff into performing to the detriment of any potential acting career and her self-esteem.[90] All the while, Defendant kept Plaintiff on a modest retainer that reinforced her economic dependence on him and her submission to his will. Given these facts, for the Dissent to the Appellate Division's opinion below to characterize Plaintiff's seven-year history of sexual servitude at *Penthouse* as "r[iding] the roller coaster of pleasure, fame and recognition" exposes stunning insensitivity to gross sexual exploitation and embraces a "blame the victim" point of view.[91] The work environment Defendant imposed on Plaintiff from the beginning of her employment at *Penthouse* was a set up for the sexual harassment he ultimately inflicted on her.

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86. Record at 1028, 1446, 1502, 1505.

87. Record at 692, 1456.

88. The first question in the script was "Do you have self-respect?" to which Plaintiff was instructed to answer, "Of course . . . My pictures are like works of art." Another question was whether Plaintiff felt exploited, to which she was to answer, "I'm getting paid for what I do." A third question was whether *Penthouse* was pornographic; Plaintiff was told to answer "war is pornographic." Record at 1451–59.

89. Record at 742–45.

90. Record at 647–49, 710, 712.

91. Thoreson v. Penthouse Int'l Ltd., 583 N.Y.S.2d 213, 224 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

III. PLAINTIFF PROVIDED SUFFICIENT EVIDENCE THAT DEFENDANT'S HARASSMENT WAS UNWELCOME.

In *Meritor Savings Bank FSB v. Vinson*,[92] the Supreme Court stated that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' "[93] The Court emphasized that an employee who voluntarily participates in workplace sexual activity has a cause of action for sexual harassment as long as she can demonstrate that the sexual advances at issue were unwelcome to her.[94] Although she eventually succumbed to Defendant's demands, Plaintiff communicated directly and emphatically to Defendant how offensive and undesirable they were to her.[95] When Defendant insisted that Plaintiff initiate a sexual relationship with his financial advisor, she expressed shock and told him that she did not want to.[96] This sexual activity was so repugnant to Plaintiff that to endure it she had to anaesthetize herself.[97] Plaintiff testified at trial, "I did not want to sleep with him. Guccione forced me to sleep with him."[98] Plaintiff was even more emphatic in her expression of opposition to and distress at Defendant's demand that she have sex with the owner of the furniture manufacturing company: "I started crying. I had never even met the man."[99] Defendant escalated the pressure in reaction to her display of resistance: "He said I had to do this for him, that I owed him."[100] Plaintiff's strongest assertion of the unwelcomeness of Defendant's sexual harassment was her insistence that she was "going to have a nervous breakdown," if forced to accompany Defendant to Japan, followed by her final refusal to go.[101] Defendant reacted to this resistance by firing her.[102] This record directly contradicts Cross-Appellants' assertion that "Plaintiff offered no proof of conduct that would have indicated [to

92. 477 U.S. 57 (1986).
93. *Id.* at 68 (quoting 29 C.F.R. § 1604.11(a) (1985)).
94. *Meritor*, 477 U.S. at 68.
95. Record at 826, 864.
96. Record at 826.
97. In order to endure the sex with Kreditor, Plaintiff drank. Record at 1492.
98. Record at 1470.
99. Record at 864.
100. Record at 864.
101. Record at 867.
102. Record at 867.

Defendant] that [his sexual machinations] would be unwelcome."[103]

There is no legal requirement that a sexual harassment plaintiff offer proof of efforts to resist sexual harassment, as Cross-Appellants suggest in their brief.[104] To the contrary, courts have repeatedly stated that "it is especially important to allow 'women to sue to prevent sexual harassment without having to prove that they resisted the harassment . . . .'"[105] The obvious rationale behind the fact that voluntariness is no defense to a sexual harassment claim was succinctly stated by the court in *Rudow*: "the power imbalance between employer and employee . . . often makes a worker in need of her job feel she must swallow such indignities."[106] In *Chamberlin v. 101 Realty, Inc.*,[107] the First Circuit expanded on this observation:

> [T]he perspective of the factfinder evaluating the welcomeness of sexual overtures . . . must take account of the fact that the employee may reasonably perceive that her recourse to more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances . . . may prompt the termination of her employment, especially when the sexual overtures are made by the owner of the firm.[108]

Plaintiff's inability to resist Defendant's sexual extortion was a function of the power differential between Defendant and Plaintiff, a power imbalance far more extreme than that of the typical employer-employee relationship. Not simply "the owner of the firm," Defendant was a multi-millionaire, worldly and famous at the time he hired Plaintiff.[109] By contrast, she was an unknown twenty-year-old, a high school dropout, and a former runaway who, for five years prior to meeting Defendant, had been engaged in a struggle for physical and material survival. Although Defendant repeatedly promised to advance

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103. Record at 867.

104. Brief for Cross-Appellants at 26–27, Thoreson v. Penthouse Int'l Ltd., 606 N.E.2d 1369 (N.Y. 1992) (No. 269).

105. Rudow v. New York City Comm'n on Human Rights, 474 N.Y.S.2d 1005, 1011 (Sup. Ct. N.Y. County 1984) (quoting Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981)), *aff'd*, 487 N.Y.S.2d 453 (App. Div. 1985), *appeal denied*, 489 N.E.2d 1302 (N.Y. 1985).

106. *Rudow*, 474 N.Y.S.2d at 1008.

107. 915 F.2d 777 (1st Cir. 1990).

108. *Id.* at 784.

109. *Chamberlin*, 915 F.2d at 784.

Plaintiff in her career and her life, in reality, he rendered her more and more powerless during the course of their relationship, fostering her financial dependence on him by undermining alternative sources of income (including an acting career) and eroding her self-esteem through his demand that she participate in increasingly degrading pornography. By the time Defendant began to insist that Plaintiff sell sexual favors to his business associates, "he held a position of power over her that, in combination with his unwelcome sexual [demands], was tantamount to coercion."[110]

Cross-Appellants distort and misapply the law when they use a "totality of the circumstances" analysis to dredge up irrelevant and unreliable allegations to smear Plaintiff as a prostitute who welcomed Defendant's pimping.[111] "[T]otality of the circumstances" is the standard courts have traditionally used in hostile environment cases to evaluate the entire environment of an alleged sexual or racial harasser's workplace to determine "[w]hether sexual harassment at [that] workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees."[112] In the vast majority of cases, this analysis has been used to evaluate the hostility and abusiveness of the defendant-employer's conduct and workplace. Hence, in *Snell v. Suffolk County*,[113] the Second Circuit articulated the standard ("Whether racial acrimony in a particular institution is 'sufficiently pervasive' to constitute a Title VII violation is to be determined from the totality of the circumstances.")[114] and then applied it to the evidence of racial harassment, i.e., "the proliferation of demeaning literature and epithets."[115] Other cases in which courts have used a "totality of the circumstances" analysis to evaluate the severity and pervasiveness of an employer's harassing acts include *Campbell v. Kansas University*[116] ("Whether sexual harassment is sufficiently pervasive or severe to create

110. Carrero v. Housing Auth., 890 F.2d 569, 578 (2d Cir. 1989).

111. At that, *Penthouse* called as a witness a woman who over a decade before had been a roommate of Plaintiff's sister. Despite the fact that this witness had met Plaintiff only once, she testified that she knew her to be a prostitute. She also testified that she had stolen Plaintiff's address book and found the name of a pimp in it. Record at 2198–233, 1003, 1076, 3143.

112. Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).

113. 782 F.2d 1094 (2d Cir. 1986).

114. *Id.* at 1103 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

115. *Snell*, 782 F.2d at 1103.

116. 780 F. Supp. 755 (D. Kan. 1991).

a hostile working environment must be determined from the totality of the circumstances.");[117] *Hicks v. Gates Rubber Co.*[118] ("Whether the sexual conduct complained of is sufficiently pervasive to create a hostile or offensive work environment must be determined from the totality of the circumstances.");[119] *Babcock v. Frank*[120] ("[W]hether conduct reaches that threshold of severity or pervasiveness is a determination that must be based on the 'totality of circumstances,' which must promise more than minor 'isolated incidents' or 'casual comments' that express harassment or hostility.");[121] and *Barbetta v. Chemlawn Services Corp.*[122] ("Casual comments . . . are insufficient. Whether sexual harassment is 'sufficiently pervasive' to constitute a Title VII violation is to be determined from the totality of the circumstances.").[123] The only instance *Amici* can locate of a decision stating that a "totality of the circumstances" analysis should be used to scrutinize the character and background of a plaintiff is the misguided majority opinion of the Sixth Circuit in *Rabidue v. Osceola Refining Co.*[124] This is the approach on which the dissent to the decision of the Appellate Division seizes to bludgeon Plaintiff for the hardship of her teenage years and her exploitation by Defendant.[125]

Attempting to shift the focus of this appeal from the conduct of the Defendant to the character of his victim, Cross-Appellants mischaracterize the law in order to wage a no-holds-barred character assassination campaign against Plaintiff.[126] Cross-Appellants attack Plaintiff

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117. *Id.* at 761 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

118. 833 F.2d 1406 (10th Cir. 1987).

119. *Id.* at 1413 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

120. 729 F. Supp. 279 (S.D.N.Y. 1990).

121. *Id.* at 288 (citing Watts v. New York City Police Dep't, 724 F. Supp. 99, 104 (S.D.N.Y. 1989)); *Snell*, 782 F.2d at 1103.

122. 669 F. Supp. 569 (W.D.N.Y. 1989).

123. *Id.* at 572 (citing Snell v. Suffolk, 782 F.2d 1094, 1103 (2d Cir. 1986)).

124. 805 F.2d at 620, *cert. denied*, 481 U.S. 1041 (1987).

125. Thoreson v. Penthouse Int'l Ltd., 583 N.Y.S.2d 213, 223 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992). Like the Sixth Circuit majority in *Rabidue*, Judge Wallach, in his dissent, interprets a "totality of the circumstances" analysis to mean not an examination of the Plaintiff's work environment but a ruthless dissection of the Plaintiff's "background and experience." Applying this standard to Plaintiff, he remarks, "[S]he was no stranger to topless bars and . . . roles calling for her appearance in a state of undress." *Id.* He indicates that such a woman could not have been injured by Guccione's alleged actions. *Id.*

126. Brief for Cross-Appellants at point I.

for jobs she took to survive as a teenage runaway, years before she even met Defendant and approximately a decade before he began to sexually harass her by requiring her to dispense sexual favors to his business associates.[127] Cross-Appellants assert that because Plaintiff posed for *Penthouse* and succumbed to Defendant's demand that she perform in sexually explicit scenes in *Caligula*, it follows that she welcomed and deserved his demands that she have sexual relationships with his colleagues.[128] Cross-Appellants cite an unsubstantiated claim made by a *Penthouse* employee on retainer for *Penthouse* at the time she testified as *Penthouse*'s witness.[129] Cross-Appellants try to smear Plaintiff as a prostitute by referring to the confused and incredible testimony of another *Penthouse* witness, a former roommate of Plaintiff's sister, whose entire acquaintance with Plaintiff consisted of a weekend visit. This visit took place before Plaintiff had even met Defendant and ended when Plaintiff ordered her to leave.[130]

This evidence is not only flimsy and unreliable, it is irrelevant. Courts have repeatedly held that a plaintiff's history and character are irrelevant to an inquiry into sexual discrimination in the workplace.[131] In *Swentek v. US AIR, Inc.*,[132] the Fourth Circuit held that evidence that the plaintiff engaged in sexual pranks, made sexual propositions, and conducted obscenity-laced conversations about sex with co-workers did not waive her legal protection against unwelcome harassment in the workplace.[133] The *Swentek* court stated:

> We note at the outset that the trial court misconstrued what constitutes unwelcome sexual harassment. It held that [Plaintiff]'s own past conduct and use of foul language meant

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127. Brief for Cross-Appellants at point I.

128. Brief for Cross-Appellants at point I.

129. Lori Wagner testified that Plaintiff bragged about her sexual performance in *Caligula*. Record at 2432.

130. Record at 1235–56, 2929.

131. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) ("It is not our job to review the evidence and decide that the negative reactions to [Plaintiff] were based on reality; our perception of [Plaintiff's] character is irrelevant."); *Rabidue*, 805 F.2d at 625 (Keith, J., dissenting) ("The record establishes plaintiff possessed negative personal traits. These traits did not, however, justify the sex-based disparate treatment . . . .") *cert. denied*, 481 U.S. 1041 (1987); Danna v. New York Tel. Co., 752 F. Supp. 594, 612 (S.D.N.Y. 1990) ("[T]his court is not here to evaluate [Plaintiff]'s behavior, but [Defendant]'s.").

132. 830 F.2d 552 (4th Cir. 1987).

133. *Id.* at 557.

> that [Defendant]'s comments were "not unwelcome" even though she told [him] to leave her alone. . . . Plaintiff's use of foul language or sexual innuendo in a consensual setting does not waive "her legal protections against unwelcome harassment."[134]

The issue in the instant appeal is not whether Plaintiff "is nice" or has a "respectable" background but whether the Appellate Division's decision upholding the trial court's finding of sexual harassment is supported by sufficient evidence. Cross-Appellants' smear of Plaintiff is a smokescreen intended to distract this court from its task.

In addition to the irrelevance of Cross-Appellants' attack on Plaintiff's character, there are compelling policy reasons for the court to repudiate such a tactic. Savaging a sexual harassment plaintiff's character by bringing up ancient allegations about her work history or insinuating that she is a prostitute who welcomes sexual exploitation is comparable to the increasingly discredited strategy, long used by defense lawyers in rape cases, of smearing victims as promiscuous, immoral, and "asking for it."[135] In both situations, the implication is the same: " 'It never happened, and what's more they deserve it.' "[136] The humiliation that rape victims were subjected to during trial was so severe and the chilling effect on rape reports so great that states finally enacted rape shield laws to prohibit the use of evidence about the victim's sexual history.[137] If sexual harassment defendants succeed with comparable smear tactics, women victimized by sexual abuse in the workplace will be reluctant to come forward: "[A] firm rule in sexual harassment trials against the introduction of evidence concerning a victim's sexual conduct would prevent defendants from playing upon sexist prejudice by invoking the outmoded stereotype of the 'bad' or 'fallen' woman who

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134. *Swentek*, 830 F.2d at 557 (quoting Katz v. Dole, 709 F.2d 251, 254 n.3 (4th Cir. 1983)).

135. This defense is most often employed in cases in which the complainant knew the defendant prior to the attack. *See* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088 (1986). As a criminal defense attorney working in New York City, however, I have seen it employed by defense attorneys even in cases of stranger rape. During the cross-examination the defendant will ask the complainant whether she is a prostitute; her denials are met with a wink to the jury.

136. Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (quoting RAPE VICTIMOLOGY xv (L. Schultz ed. 1975)).

137. *See* Leading Cases, 100 HARV. L. REV. 100, 284 (1986) (reviewing Meritor Savings Bank FSB v. Vinson, 477 U.S. 57 (1986)).

asks for abuse."[138]

A recent example of such stereotyping occurred in October 1991, when Professor Anita Hill testified before the Senate Judiciary Committee at the confirmation hearings of Supreme Court nominee Clarence Thomas.[139] Although Professor Hill's background and work experiences were very different from Plaintiff's, her character was similarly smeared by misogynistic stereotypes of a sexual nature. Where Professor Hill was reviled as a mentally unbalanced sexual fantasizer out to seek revenge against the man who had sexually rejected her,[140] Plaintiff is denigrated by Cross-Appellants as a loose woman who welcomed being pimped by Defendant to his associates.

While denigrating sexual harassment plaintiffs as "bad women" who get what they ask for dissuades all victims from bringing claims, the chilling effect of such a tactic is particularly great on those women who, like Plaintiff, have histories of deprivation and exploitation. In counseling victims of sexual abuse, *Amici* have learned that women with such histories are more susceptible to later incidents of sexual violence and exploitation than are women from more fortunate backgrounds.[141] Early experiences of abuse, deprivation, and/or exploitation often leave women ill-equipped to recognize and avoid potentially abusive situations.[142] Such experiences also often render women and girls economically and psychologically vulnerable to sexual predators.[143] A runaway from a broken home who, at the tender age of fifteen, lost the guidance, protection, and material support of her family, Plaintiff was

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138. Leading Cases, *supra* note 137, at 284.

139. *See generally* TIMOTHY M. PHELPS & HELEN WINTERNITZ, CAPITOL GAMES: THE INSIDE STORY OF CLARENCE THOMAS, ANITA HILL, AND A SUPREME COURT NOMINATION (1992).

140. Homi K. Bhabha, *A Good Judge of Character: Men Metaphors and the Common Culture, in* RACE-ING JUSTICE, EN-GENDERING POWER 248 (Toni Morrison ed., 1992).

141. *See* D. RUSSELL, RAPE, CHILD SEXUAL ABUSE AND WORKPLACE HARASSMENT 287 (1984).

142. JUDITH LEWIS HERMAN, TRAUMA AND RECOVERY 111 (1992) ("Almost inevitably, the survivor has great difficulty protecting herself in the context of intimate relationships. Her desperate longing for nurturance and care makes it difficult to establish safe and appropriate boundaries with others. Her tendency to denigrate herself and to idealize those to whom she becomes attached further clouds her judgment. Her empathic attunement to the wishes of others and her automatic, often unconscious habits of obedience also make her vulnerable to anyone in a position of power or authority.").

143. HERMAN, *supra* note 142, at 111.

particularly susceptible to sexual exploitation.[144] It is ironic that Cross-Appellants attack Plaintiff's credibility by evoking the very history that rendered her vulnerable to Defendant's sexual depredation. Permitting defendants in sexual harassment cases to try to destroy plaintiffs' credibility by engaging in irrelevant personal attacks gives abusers license to continue to prey on the most disadvantaged women. Women workers with histories like Plaintiff's deserve no less protection under the law than women who mature and work in supportive and protective environments.

IV. PLAINTIFF DID NOT "ASSUME THE RISK" OF A SEXUALLY HOSTILE WORKPLACE.

For women employed in the sexual entertainment industry, the need for meaningful legal protection against all forms of sexual abuse, including sexual harassment, cannot be overstated. In his concurrence to the Appellate Division's opinion, Justice Kassal points to the plight of women working under such conditions and their urgent need for legal recourse against sexual harassment:

> As the trial court observed, "Sexual slavery was not a part of plaintiff's job description," despite the fact that her employment involved the commercial exploitation of her physical appearance. Indeed, plaintiff's very occupation and background rendered her especially vulnerable to sexual exploitation. The sexual exploitation and harassment found to have occurred by the trier of fact, which took the form of coercive sexual relationships designed to further Guccione's financial interests, subjected plaintiff to levels of humiliation and degradation that no civilized society should tolerate.[145]

In this case, the trial court stated, "[p]rotections against sexual harassment are arguably more necessary in a workplace permeated by conceptions of women as sex objects"[146] and stressed that "[w]hen there is a significant potential for discriminatory abuse of power by an employer,

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144. Record at 594–600.

145. 583 N.Y.S.2d 213, 218 (N.Y. App. Div. 1992) (quoting Thoreson v. Penthouse Int'l Ltd., 563 N.Y.S.2d 968 (Sup. Ct. N.Y. County 1990)), *aff'g* 563 N.Y.S.2d 968 (Sup. Ct. N.Y. County 1990), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

146. *Thoreson*, 563 N.Y.S.2d at 976.

the need for an effective deterrent to enforce public policy is even greater."[147] Both the trial court and the concurring justice emphasize that Defendant's exploitation of Plaintiff in *Penthouse* and *Caligula* did not give him license to sexually harass her by requiring her to have sexual relationships to promote his business interests. As Judge Wilke said, "The offensiveness of defendant's conduct is not mitigated by the fact that plaintiff's job as a model and actress for *Penthouse* involved, in part, the commercial exploitation of her physical appearance."[148]

Amicus, The National Coalition Against Sexual Assault (NCASA), provides crisis counseling to women victimized by sexual abuse, some of whom work in the sexual entertainment industry. NCASA has learned that women employed in pornography and related businesses are extraordinarily susceptible to sexual abuse. NCASA has treated and served as an advocate for women performers who have been sexually harassed, like Plaintiff, by being pressured or forced by their employers or supervisors to perform unwanted sexual acts with the employers' associates or customers.[149] If remedies against sexual harassment are unavailable to these women, sexual abuse at the hands of their employers will continue and grow even more severe.

Implicit in Cross-Appellants' brief, as evidenced by the repeated use of statements like "[Plaintiff] eagerly sought to associate with *Penthouse* to exploit her good looks for profit,"[150] is the notion that by accepting sexually exploitative employment at *Penthouse*, Plaintiff assumed the risk of the most extreme forms of sexual denigration and abuse, including sexual servitude. What is implicit in Cross-Appellants' brief is made explicit by the dissent to the Appellate Division's decision, who contends that Plaintiff should not have prevailed on her sexual harassment claim because she should have known of "Defendant's notoriety as a leading publisher in the sex industry" when she agreed to work for *Penthouse*, therefore, she assumed the risk of the sexual harassment to which she was subjected in that "sex-oriented" atmosphere.[151] For this proposition, the dissent cites *Rabidue v. Osceola Refining Co.*[152]

147. *Thoreson*, 563 N.Y.S.2d at 976.

148. *Thoreson*, 563 N.Y.S.2d at 976.

149. *See* Evelina Giobbe, Report to the Minnesota Coalition for Battered Women (April 1991).

150. Brief for Cross-Appellants at 5–8.

151. Thoreson v. Penthouse Int'l Ltd., 583 N.Y.S.2d at 213, 223 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).

152. 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

in which the majority held that a workplace pervaded by anti-female obscenities, demeaning visual displays of nude and partially clad women, and vicious sexual slurs was not sexually hostile because it preexisted plaintiff's entrance into the workplace.[153] The *Rabidue* court's argument that workers assume the risk of sexually hostile environments has been squarely rejected by courts and legal scholars alike.[154] In *Robinson v. Jacksonville Shipyards, Inc.*,[155] the court attacked the *Rabidue* majority's "social context" reasoning as "lack[ing] a sound analytical basis" and argued that it "cannot be squared with [the promise of] Title VII."[156] In contrast, the highly influential and widely quoted *Rabidue* dissent squarely rejected the notion "that a woman assumes the risk of working in an abusive, anti-female environment."[157] The dissent went on to declare that "even sex industry employees are protected under [the law] from non-job-related sexual demands, language or other offensive behavior by supervisors or co-workers. . . . no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted . . . ."[158]

Imported from the tort law of negligence, assumption of risk was once widely used by employers defending themselves against lawsuits brought by injured employees.[159] The defense was abolished by Congress in 1939 because it left workers seeking recovery for workplace injuries hopelessly disadvantaged and promoted negligence and

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153. *Id.* at 620.

154. *See, e.g.*, Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990); Lipsett v. University of P.R., 864 F.2d 881, 905 (1st Cir. 1988); Snell v. Suffolk County, 782 F.2d 1094, 1103 (2d Cir. 1986); Barbetta v. Chemlawn Servs. Corp., 669 F. Supp. 569, 573, n.2 (W.D.N.Y. 1987); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 115 (1987); K. Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAN. L. REV. 1183, 1212 n.18 (1989); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1201–10 (1990).

155. 760 F. Supp. 1486 (M.D. Fla. 1991).

156. *Id.* at 1526.

157. *Rabidue*, 805 F.2d at 626.

158. *Rabidue*, 805 F.2d at 626. *See also Lipsett*, 864 F.2d at 905; *Robinson*, 760 F. Supp. at 1525–27; *Barbetta*, 669 F. Supp. at 573 n.2; Ehrenreich, *supra* note 154, at 1201–10.

159. For example, Lord Bromwell took the following position in a case in which a worker was injured when a stone that was being lifted over his head in the course of employment fell and hit him. The plaintiff here thought the pay was worth the risk, and did not bargain for a compensation if hurt: in effect, he undertook the word with its risks for his wages and no more. Smith v. Baker & Sons 1891 App. Cas. 325, 344.

exploitation by employers.[160] Cross-Appellants' attempt to suggest that Plaintiff assumed the risk of Defendant's abuse by accepting employment at *Penthouse* is a throwback to an era in which employees were accorded no meaningful legal protection.[161]

Cross-Appellants are attempting to use Defendant's creation and perpetuation of a work environment, in which the sexual exploitation of women is the work product, as a shield against liability. If this "assumption of risk" defense were to be accepted, it would be devastating to women workers in conditions like those endured by Plaintiff; Defendant and others in his position would have unrestrained license to sexually abuse their female employees. *Amici* urge this court to reject Cross-Appellants' "assumption of risk" smokescreen and to embrace the principle suggested by the trial court below: *No form of employment "constitute[s] a waiver of [a woman's] right to be free from sexual harassment in the workplace."*[162] ♣

160. 45 U.S.C. § 54 (1988).

161. "[T]he traditional law of tort . . . cannot be imported wholesale into the law of employment discrimination without significantly undercutting its effectiveness." Taub, *supra* note 76, at 378 n.153.

162. Thoreson v. Penthouse Int'l Ltd., 563 N.Y.S.2d 968, 976 (Sup. Ct. N.Y. County 1990) (emphasis added), *aff'd*, 583 N.Y.S.2d 213 (App. Div. 1992), *aff'd*, 606 N.E.2d 1369 (N.Y. 1992).